not made on the document, because the original, it was said, had been lost in Saigon.

With regard to this latter defect, if the original were in existence, no doubt, the time for endorsing it might be extended (*Hastings* v. *Hurley*, W.N. 1881 page 39) but, with regard to the former defect, Piggott, citing *Hawthorn* v. *Harris*, 23 W.R. 214, and *Phillipson* v. *Emmanuel*, 56 L.T. 858, also cited at the Bar, says that all subsequent proceedings founded on the writ would be void and not merely irregular.

I am indebted to Mr. Page for directing my attention to the case of *Hamp-Adams* v. *Hall*, L.R. (1911) 2 K.B.D. 942, and I appreciate his frankness in doing so. The case is, of course, later than *Hastings* v. *Hurley*, and judgment in default had been signed. The Lords Justices there held that when proceedings are going to be taken against a defendant in his absence, it is most important that there should be at every stage a strict compliance with the Rules, and that non-compliance is not a mere irregularity which can be waived, but a matter which prevents any further proceedings from being taken on the writ. The case is rather confirmatory of the conclusion at which I have arrived but I should have arrived at the same conclusion without its assistance.

For the above reasons I am of opinion that the summons succeeds and that there should be an order in terms.

Notice of writ and service set aside with costs to Defendant in any event.

Solicitors for Plaintiffs—*Allen & Gledhill.*

Solicitor for Defendant—*E. R. Koek (Sr.)*

[ORIGINAL CIVIL JURISDICTION]
BARRETT-LENNARD, J.
April 16, 1923.
[APPELLATE CIVIL JURISDICTION]
SHAW, C.J., BROWN & REAY, JJ.
August 17, 1923.

ATTORNEY GENERAL FOR THE STRAITS SETTLEMENTS.....Appellant

vs.

PANG AH YEW.....Respondent

[MALACCA CROWN SUIT No. 1 of 1923]
[ORIGINATING MOTION No. 2 of 1923]
[SINGAPORE APPEAL No. 15 of 1923]

Sale of land for arrears of land revenue—Non-compliance with Ordinance—Liability of Crown for torts of its servants—Petition of right—Ordinance No. 22 (Crown Suits) S. 20—Ordinance No. 35 (Land Revenue Collection) S. 4—Ordinance No. 132 (Public Authorities Protection).

Under Ordinance No. 22 (Crown Suits) a petition of right can be maintained to recover damages arising from a Collector of Land Revenue selling land under Ordinance No. 35 (Land Revenue Collection) for arrears of revenue without first serving a written notice of demand as required by S. 4 of Ordinance No. 35 (Land Revenue). The Collector in selling is an agent of the Crown although he acts under statutory authority, and the fact that he has carried out his duties in an unauthorised manner does not prevent the Crown from being liable.

No action lies against any person acting in execution of statutory duties or other public duties, unless the party complaining can allege malice and want of reasonable and probable cause.

Judgment of Barrett-Lennard, J., affirmed by Court of Appeal.

Principles on which the Court of Appeal will allow points of law not taken in the Court of first instance to be raised on appeal discussed by Reay, J.

The case arose on a motion by the Attorney-General (Appellant) for an order that the petition of right presented by the respondent should be dismissed as being bad in substance and in law, and upon other grounds, and disclosed no cause of action.

The motion was heard by Barrett-Lennard, J., who on the 16th April, 1923, ordered that the said motion be dismissed. The appellant appealed to the Court of Appeal at Singapore against the said order and the appeal came on for hearing before Shaw, C.J., Brown and Reay, JJ., who on the 22nd December, 1923, dismissed the said appeal. From the decision of the Court of Appeal the appellant appealed to the Privy Council, whose Judgment is reported in L.R. (1925) A.C. 555, and is therefore omitted from this report.

The circumstances in which the petition of right was presented, and the provisions of the relevant Ordinances, appear from the Judgments reported below.

BARRETT-LENNARD, J.—This is a motion by the Attorney-General for the dismissal of a Petition of Right on the ground that it discloses no case, admitting as true the facts alleged in it, which would entitle the suppliant to any decree against His Majesty's Local Government.

The facts set out in the petition, and which for the purposes of this motion must be accepted as correct, admit of a very brief statement. In February, 1920, the suppliant acquired, at the price of $6,000, some rubber-bearing lands situate at Tanjong Minyak in the Settlement of Malacca. At all material times there were on the land quarters for coolies and a store containing various articles commonly used by, or found in the possession of, planters. These articles included a latex jar, mangles, buckets, baskets, plank beds and sheets of rubber. They were of sufficient value to liquidate the claim on the part of the Government now to be mentioned. That claim was for quit-rent in respect of the year 1921, which the suppliant confessedly omitted to pay. But no written notice of demand was served as required by section 4 of Ordinance No. 35 (Land Revenue Collection), and no attachment of the

moveables was issued, as required by section 5 of that Ordinance, before resort is had to the lands. Nevertheless the Collector of Land Revenue (hereafter called the Collector), in supposed exercise of the power conferred upon him by section 7 of the Ordinance, sold the land on the 7th of March 1922, for $45. The suppliant prays for a declaration that the sale was illegal and that an enquiry may be directed as to the amount of compensation payable for the loss sustained by her in consequence of the ransacking operation of the sale. It is desirable to offer no comment upon the acts charged in the petition. Letters written by the Collector, and set out in the petition, traverse the imputation of irregularity on his part, and evidence, if given may establish a defence to the prayers. For these reasons I propose simply to dispose of the point of law raised, and earnestly pressed by the Solicitor-General. His contention is that the acts or defaults charged in the petition were not in law the acts or defaults of His Majesty's Local Government, but those of a person uncontrolled by that Government and acting in pursuance, or intended pursuance of duties imposed on him by the Legislature. "The position of the Collector," said the Solicitor-General, "may be likened to that of a Judicial Officer whose position excludes any right of Governmental interference." On turning to the Ordinance it will be found that the obligation with reference to demands, notices, attachments and sales are cast upon the Collector and not upon any of the superior officials of the Colony. The Governor in Council is authorised to frame rules which, subject to the usual condition, have the force of law; but nothing done by that authority has any connection in point of fact with the conduct attributed to the Collector. In my opinion the short question is: was the Collector, when selling the suppliant's land, acting as an executive officer of the Sovereign, or as a statutory entity invested with rights and duties as regards particular debtors, but irresponsible to the Sovereign as such. If he is to be looked upon as an executive officer, this case must proceed to trial. If on the other hand he is merely a statutory entity, it must stand dismissed. The position of the Sovereign in relation to subject or denizens, when they complain of a wrong, is as follows: Apart from legislative enactment, a Petition of Right grounded on a wrong in the legal sense of the term shows no right of redress against him or one of his Governments. Venerable decisions declare that the maxim, "the King can do no wrong," applies not only to an injury done personally by the Sovereign, if such a thing can be supposed possible, but to an injury done by a subject while acting as the servant of the Sovereign. In the eye of the common law no acts can be wrongs, so far as the Sovereign is concerned, and consequently no right to be redressed arises: see *Tobin* v. *The Queen*, (16 C.B.N.S. 310) and *Feather* v. *The Queen*, (6 B. & S. 257). The immunity conferred by the common law upon the Sovereign rests upon obviously fallacious reasoning. The liability of a principal as regards the acts of an agent is not due to an imputation of vicarious wrong-doing on the part of the principal, but to a rule of law which onerates a principal with the unqualified duty of seeing that an agent, while in and about his (the principal's) business, pays a proper regard to the rights of other people. Further when lawyers speak of the Sovereign they rarely mean the living man who now execute the duties of that exalted post. They mean a corporation sole, a metaphysical entity, a creation of our jurisprudence, and the symbol of the British Empire and its different parts. The earliest enunciation of the first of the last two propositions is to be found in the celebrated judgment of Willes, J., in *Barwick English Joint Stock Bank*, (L.R. 2 Ex. 259). The second proposition is of course familiar to modern students of law. In practice all British Governments recognise the true theory, and relief is generally obtained by a person injured owing to the wrongful conduct of a royal servant. Such injured person, subject again to any relevant legislation, can sue that person for his own personal defaults whether he be a Secretary of State, the Governor of a Colony, or any other official: see *Lord Bellamot's* Case (2 Salk. 825); *Money* v. *Leech*, (3 Burr. 1742); *Sutton* v. *Johnston*, (1 T.R. 493); *Sutherland* v. *Murray*, (1 T.R. 538); *Raleigh* v. *Goschen*, (1901) 2 K.B. 781. Very naturally the servants of the Sovereign, unless their conduct is open to the strongest censure on moral grounds, are defended and indemnified at the public cost. In such indirect way right is done in a manner so satisfactory that the Imperial Parliament has not yet found it necessary to bring the law of England into complete harmony with modern juristic views. At this stage it will be not uninteresting to glance at the law of France. It distinguishes between the State exercising its sovereign authority in performing an "*acte de gouvernment*" and the State carrying on, through various departments, the administration of the country. In regard to all matters arising out of the administration there is no immunity. It is true that the action must be brought (subject to certain qualifications) in the Administrative Court, but a remedy for a wrong exists and the Courts are singularly free to decide on equitable grounds. Professor F. P. Walton, a contributor to the "Journal of the Society of Comparative Jurisprudence," expressed, in an article which I have read, the opinion that *Bainbridge* v. *Postmaster-General*, (1906, 1 K.B. 178), is at

variance with French conceptions. In *Bainbridge's* case it was held that no action lay against the Postmaster-General on account of the negligence of his subordinates, the assigned reason being that the highest and the most humble officers of the Sovereign are simply fellow-servants. In one instance, at any rate, the Imperial Parliament has preferred the French theory to that laid down by His Majesty's Judges: see *Dixon* v. *Farrer*, (18 Q.B.D. 43). Then in some of our Colonies, including the Straits Settlements, the Legislatures have subjected the Sovereign to liability in respect to the torts of his servants. The Government of these Colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in England were in the past left to private enterprise and to employ many inferior officers and servants. For this reason it was thought that the exemption from suit of the Sovereign would amount to a denial of justice. It is, however, to be noticed that this liability has not been limited to cases in which the Governments have travelled outside the purely political or administrative functions. The relevant authorities are the *Queen* v. *Williams*, (9 A.C. 418), *Farnell* v. *Bowman*, (12 A.C. 643), and the *Attorney-General* v. *Wemyss*, (13 A.C. 192).

That, subject to the common law privilege of the Sovereign, an incautious, excessive or vexatious execution of statutory duties generally gives rise to a claim for damages or compensation is a proposition established by the decisions: see *Ricket* v. *The Metropolitan Railway*, (L.R. 2 H.L. 175); *Biscoe* v. *G. E. R. Co.*, (L.R. 16 Eq. 636); *Attorney-General* v. *The Gas Light and Coke Co.*, (7 C.D. 217). The foregoing observations show, I think, that if in the present case, the Collector ought to be regarded as an executive officer while performing his duties the public treasury is bound to compensate the suppliant on proof, to the satisfaction of the trial Judge, of the facts alleged in the petition.

In order to determine whether the Collector is, while executing his office, an executive officer it is necessary to inquire (1) what his position would be in the absence of any enactment, and (2) what is the true effect of the enactment quoted so far as that position is concerned. As to the first point, it appears to me that a persson charged with the collection of the Sovereign's public rents or dues is not only a Royal servant, but is one whose actions are controlled at every stage by that Sovereign. Such a servant is clearly an executive officer and, in the Straits Settlements, is under a duty of perfect obligation to obey the directions given to him by the Governor. It follows that the funds of the Government ought, in a proper case, to be used for the purpose of compensating subjects or denizens who have suffered through deviations by such an officer from the law binding upon him. As to the second point, I am of opinion that the framers of Ordinance No. 35 had simply two objects in view. First they desired to recover rents and assessments in a manner not authorised by the common law, and, for this purpose, to quiet titles gained by the exercise on the part of the Collector of the power of sale found in section 7. Secondly they desired to arm the Courts with power to check improper attachments or sales. There is not a line in the Ordinance which warrants the inference that the Collector is to be freed from his undertaking as a Civil Servant to carry out the commands of his superiors. In my opinion he, when attaching or selling property, merely executes in a particular manner, the unquestioned right of the Sovereign to acquire the full fruition of his public claims: see *Dixon* v. *Farrer*, (*ubi supra*), *Graham* v. *Public Works Commissioners*, (1901, 2 K.B. 781), and *Roper* v. *Public Works Commissioners*, (1915, 1 K.B. 45).

The notion that the Collector as such exercises judicial functions strikes me as void of legal foundations and irreconcilable with the decisions last cited.

The one topic, which may merit consideration, is whether the right of an alleged debtor to apply to the Courts under section 11 of the Ordinance marks the measure of the relief allowed. The answer, I think, ought to be in the negative. A power to stay an improper sale cannot be regarded as a manifestation of an intention to exclude any remedy for such a sale if completed.

I am, accordingly, of opinion that the Attorney-General's motion must be refused. The costs will be costs in the cause. Before concluding it is right to say that the Government has not sought to escape the payment of compensation to the suppliant if in point of fact she merits it. The Solicitor-General stated at the Bar, and his statement was in accord with the best British traditions, that the Government was willing to negotiate, as on other occasions, with any person able to make out a case of harsh or improper treatment.

Motion dismissed.

The Crown appealed from the above Order of Barrett-Lennard, J., and the appeal was heard before Shaw, C.J., Brown and Reay, JJ.

G. G. Seth, Solicitor-General, for the Crown (Appellant).

S. C. Goho, for the Plaintiff (Respondent).

Cur. Ad. Vult.

SHAW, C.J.—The respondent, Pang Ah Yew, who was formerly in possession of Crown Land by virtue of a statutory Grant at an annual rent under Ordinance No. 34 (Crown Lands), presented a Petition of Right dated the 6th December, 1922, under section 22 of Ordinance No. 22 (Crown Suits), praying for redress for the alleged illegal sale of the land comprised in her Grant by the Collector of Land Revenue, Malacca, who had purported to act under the provisions of Ordinance No. 35 (Land Revenue Collection).

The irregularities making the sale illegal complained of were (1) that no proper notice of demand for the rent was made as required by section 4 of the Ordinance and (2) that resort was not first had against the personal property on the land as required by section 5.

The Petition was sanctioned by the Governor and the Attorney General then moved the Court, under section 22 (2) of the Crown Suits Ordinance to dismiss the Petition on the ground that even assuming that the facts stated in it were true it disclosed no case in law against the Crown.

The notice of motion is dated the 7th March, 1923, and the substance of the Attorney-General's objection is set out in paragraphs 3 and 4 which are as follows:—

> "3. That the acts and defaults alleged in the said petition even if true, were not the acts and defaults of the Crown, but of Frederick Joseph Morten, a person acting in pursuance of, or intended execution of, statutory duties imposed on the said person by Ordinance No. 35 (Land Revenue Collection).
>
> "4. That Frederick Joseph Morten, in selling the land in question, acted under a statutory power which conferred upon him, acting as he was, in a judicial capacity, a discretion, for the wrong exercise of which (though the Attorney-General does not admit that it was wrongly exercised) the said Frederick Joseph Morten and not the Crown is liable."

After hearing argument Barrett-Lennard, J. dismissed the motion and the Attorney-General has appealed from his decision.

It is well established law in England that the Crown cannot be sued in tort and that a Petition of Right will not lie for damages alleged to have been committed either by the Crown or by a servant of the Crown acting by the Crown's authority (see *Canterbury* v. *Attorney-General*, (1843), 1 Ph. 306; *Tobin* v. *Reg.*, (1864), 16 C.B., N.S. 310; *Feather* v. *R.*, (1865) 6 B. and S. 257), and that the only remedy, if one exists, is against the person who actually committed the tort.

It would serve no useful purpose for me to go into the origin of the doctrine that "the King can do no wrong" and of its extension to the non-liability of the Crown for the acts of its servants committed in the scope of their employment. It is however, a doctrine that is unknown to most systems of law and one that is considered by most people at the present day to be somewhat of an anachronism, for there seems to be small reason why the Crown, which now in these matters merely represents the Public, should not compensate a person who has sustained damage in consequence of the improper act of a public servant, acting in the scope of his employment in the business of the public, in the same way as a private person is liable to pay compensation for the wrongful act of his servant similarly acting.

Recognising this, the Legislatures of most of the British Colonies have departed from the English law on the subject and have enacted that the Crown, or persons representing the Government, may, subject to the proper procedure being adopted, be rendered liable to pay compensation for injuries in the same manner and in similar circumstances as those under which liability attaches in the case of a private individual.

This has been done in the Straits Settlements by section 20 of Ordinance No. 22 (Crown Suits) and, in the face of the decision of the Privy Council in the case of the *Attorney-General* v. *Wemyss*, (1888), 13 App. Cases 192, it is impossible to contend that the Local Government here, representing the Crown, is not liable to compensate an individual injured by the wrongful act of an Officer of the Government acting within the scope of his employment in similar circumstances to those in which an ordinary individual would be liable to pay compensation for the wrongful act of his servant or agent.

I do not think it is necessary to embark upon any detailed examination of the very numerous cases in which individuals and corporations have and have not been held liable for wrongs committed by their employees. The cases are not all very easy to reconcile and each case must depend on its own facts as to whether the employee was acting within the scope of his employment at the time he committed the act complained of. One principle can, however, be clearly gathered from the cases namely, that although an employer is generally not liable if the act done by the employee is one that the employer has not authorised him to do under any circumstances (see *Bolingbroke* v. *Swindon Local Board*, (1874), L.R. 9 C.P. 575; *Poulton* v. *South Western Rly. Co.*, (1917), L.R. 2 Q.B. 534; *Ormiston* v. *Great Western Rly. Co.*, (1917), 1 K.B. 598), yet when the act done by the employee is one that the employer has authorised the servant to do under certain circumstances and the employee does it improperly or when the circumstances have not arisen then the employer will be liable when the act is done in intended furtherance of

the business in which the employee is engaged (see *Goff* v. *Great Northern Rly. Co.*, (1861), 3 El. and El. 672; *Bayley* v. *Manchester, Sheffield and Line Rly. Co.*, (1873), L.R. 8 C.P. 148). The principle may be stated in this way, that the employer's liability for the unauthorised torts of his employee is limited to unauthorised modes of doing authorised acts.

In the present case the officer who is alleged to have improperly sold the respondent's land is an officer, and a somewhat junior officer, of the Civil Service who has been appointed by the Government to, *inter alia*, collect the rents reserved by Government Grants and he is, by virtue of his employment, authorised by the Government to use the machinery provided by the law for the purpose. The Legislature has for the convenience of the Government, given special methods of recovering Crown rents that are not available to ordinary individuals. One of these is a power to sell the land of a person in default in certain events and after certain preliminaries, and the allegation made in the Petition is that the Collector has sold the petitioner's land without carrying out these preliminaries and under circumstances that did not justify the sale. The position of the Collector is like that of the railway officials in some of the cases I have referred to and in numerous other cases appearing in the books, who, having been authorised by their employment to arrest or do some other act for certain purposes, have done the acts when the circumstances did not justify them, and is similar to that of a bailiff who, having been authorised by his employer to distrain, does so under circumstances and in a manner that renders the distress illegal (see *Gauntlett* v. *King*, (1857), C.B.N.S. 59; *Haseler* v. *Lemoyne*, (1858), 28 L.J.C.P. 103). In short he is doing an authorised act in an unauthorised manner and his employers are therefore liable.

The principle on which this liability arises is very clearly put by Willis, J. in delivering the judgment of the Court of Exchequer in *Barwick* v. *English Joint Stock Bank*, (1857), L.R. 2 Ex, 259 where, after referring to cases where officers of Railway Companies, entrusted with the execution of bye-laws relating to imprisonment and intending to act in the course of their duty, have improperly imprisoned persons who were supposed to come within the terms of the bye-laws and other similar cases, said "In all these cases it may be said, as it was said here, that the master has not authorised the act. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in."

The Solicitor-General, who appeared for the appellant, contended that the Land Revenue Collection Ordinance cast upon the Collector an obligation to proceed under the Ordinance and that therefore he was not acting as a servant or agent of the Crown but in the execution of a statutory duty. I cannot read the Ordinance as casting any statutory duty upon him. The words used are enabling words only, and the power is given, as I have stated above for the convenience of the Government in collecting its rents, and there is nothing to prevent the Government or its agents, should it be thought desirable from proceeding to recover the rents in the ordinary manner.

It was also contended that when once the Collector had commenced to proceed under the Ordinance he was acting in some sort of judicial capacity imposed upon him by the Ordinance, and that therefore he ceased to be under the orders of the Government and was not their servant or agent.

Again I can find no justification for any such contention in the Ordinance and I can see no valid distinction between the case of a person enforcing the payment of rent under powers given by legislative enactment and that of a person enforcing it by the right of distress given by the Common Law in England.

The Solicitor-General very strongly pressed upon the Court, the judgments in *Tobin* v. *Reg.*, and *Canterbury* v. *The Attorney-General*, cited above. In both these cases, besides deciding that a Petition of Right does not lie under the Common Law in England against the Crown for a tort, whether committed by the Crown or its servant, the Court further decided that in the cases before them the acts complained of were not committed by a servant of the Crown acting within the scope of his employment.

The Solicitor-General contended that the facts in those cases were undistinguishable in principle to those of the present case. In my opinion they were quite dissimilar and very different considerations arose. In *Tobin* v. *Reg.*, the Captain of a Queen's ship, employed on the suppression of the slave trade, seized a ship that he was not authorised to seize and, instead of carrying it into port, for the purpose of convenience destroyed it on the high seas.

There are obviously several very important distinctions between the facts of that case and the present—(1) The relationship between the Crown and the Captain of a ship of the Royal Navy are very different to those existing between the Crown and a person collecting Crown rents; (2) the captain of the ship was acting, or purported to act, under duties imposed upon him by the Statutes for the suppression of the slave trade and not under the orders of the Crown; and

(3) what he did was not in any event authorised by the Statutes under which he purported to act.

In *Canterbury* v. *Attorney-General*, the wrongful act was committed by the servants of the Commissioners of Woods and Forests, who are a statutory body established under an Act of the Imperial Parliament for the performance of certain duties, and it was in respect of these duties that the alleged wrongful act was committed. The relationship between the Crown and a statutory body such as the Commissioners of Woods and Forests is obviously quite different to that which exists between the Crown and an officer appointed to collect its rents.

In the course of the case reference was made to the inconvenience that might arise if the Government were to be held liable to pay compensation in all cases where public officers have exceeded the duties imposed upon them by the Legislature and by the Common Law. I am not going to discuss whether or not there would be any intrinsic impropriety to the existence of such a liability in a country where the remedies against the public officers personally have been taken away, as they have been by Ordinance 132 (Public Authorities Protection), because so far as my judgment at any rate is concerned it is limited to such a case as that which is before us and it by no means necessarily follows that the Crown would be liable in the case of a wrong committed by an officer acting under a common law or statutory duty. Such a case must be decided on its own merits if and when it arises.

On the hearing of the appeal a further point was taken on behalf of the respondent that was not taken in the Court below namely, that the Petition disclosed a good cause of action against the Crown in contract for breach of a covenant for quiet enjoyment to be implied in the Grant.

This point was not very fully argued on behalf of the respondent and was barely touched upon by the Solicitor-General in his reply and, in view of the opinion I have arrived at that the petition discloses a good ground of claim against the Government in tort, I do not think it is necessary, or indeed advisable, to consider whether the Petition may possibly also be supported on the ground that it discloses a valid claim in contract.

In my opinion the appeal should be dismissed with costs.

BROWN, J.—This appeal arises out of a petition of right preferred by Pang Ah Yew of Malacca. The subject matter of her complaint is a piece of land of about 7 acres in area held by her under statutory grant, and she alleges that this land was sold by the Collector of Land Revenue in supposed exercise of the powers vested in him by Ordinance No. 35 (Land Revenue Collection) although no notice of demand had been served on her as required by section 4 of the Ordinance and although personal property was available for seizure under section 5. The Attorney-General made application by motion under section 22 of Ordinance No. 22 (Crown Suits) for the dismissal of the petition on the ground that it disclosed no case against the Crown. The matter came before Barrett-Lennard, J., who held that the Attorney-General had failed in his contention, and it is against this decision that the present appeal is brought.

It would appear from the judgment that the question chiefly considered in the Court below was whether the Collector was acting in a quasi-judicial capacity or as an executive officer of the Government. The learned Judge adopted the second alternative and assumed, on that view of the position of the Collector, that a cause of action was disclosed. The appeal seems to carry the matter somewhat further. The two grounds of appeal, put shortly, are (1) that the Collector was acting, not in obedience to the orders of the Government, but in supposed performance of a duty imposed him by Ordinance No. 35, (2) that, even if he was acting as an agent under the orders of the Government, what he did was outside the scope of his authority.

The facts alleged by the petitioner are, of course, not admitted by the Attorney-General, but they are assumed to be true for the purposes of the argument.

It may be noticed here that the arguments presented by the Solicitor-General in his opening address went on the assumption that the claim of the petitioner was a claim in tort. The form of the petition does not, I think, exclude a claim in contract, and Mr. Goho who appeared for the petitioner made some observations on that aspect of the case to which the Solicitor-General very briefly replied. I shall refer to that matter later. For the present I propose to regard the petition as setting out a claim resting in tort.

The Privy Council decided in 1888 in *The Attorney-General of the Straits Settlements* v. *Wemyss*, 13 A.C. 192, that under section 18 (now section 20) of the Crown Suits Ordinance the Crown in this Colony could be sued in tort, but as to the nature and extent of the liability of the Crown in this respect there is very little authority. It seems clear, however, from *Farnell* v. *Bowman*, 12 A.C. 643, that where the Crown is liable in tort the liability may extend to the acts of a servant of the Crown acting by the express orders or under the implied authority of the Government, for the declaration there was that the Government by their servant broke and entered the lands of the plaintiff and lit fires thereon. It is of interest that in 1889, a claim somewhat similar to that now before us was brought in Singapore against the Collector (*Sherifa Shaika*

v. *Haughton*, 4 Ky. 523). It does not appear to have been suggested then that the Crown might have been liable, but Ordinance No. 132 (Public Authorities Protection) was not at that time in force. In regard to that Ordinance I may note the admission made by Mr. Goho, that he would have no case against the Collector.

We start, then, with the principle that the Crown may under certain circumstances be answerable for a tort committed by one of its servants by virtue of a relationship analogous to that of master and servant existing between the Crown and its officer. It is obvious that the liability created by the local Ordinance can have no application to the acts of officers performed by them in a judicial or quasi-judicial capacity, for then the relationship of master and servant does not exist, but it cannot, I think, be seriously contended that the Collector here was exercising functions in any way analogous to those of a magistrate. It is fairly clear also that if the officer is acting in the supposed performance of a duty imposed on him by law the Crown will not be liable. That was laid down in *Tobin* v. *The Queen*, 16 C.B.N.S. 310, and if the Solicitor-General had been able to satisfy me that the Collector in this case was performing, or attempting to perform, a duty cast on him by the legislature I should probably have regarded that as sufficient. We must, however, distinguish not only between a duty imposed by statute, *i.e.* by the legislature, and a duty imposed by the executive Government, but also between a duty imposed by statute and a power given by statute. Bearing these distinctions in mind I have little hesitation in saying that a Collector of Land Revenue, when he sells land under the provisions of Ordinance No. 35, is not acting in obedience to a command of the legislature, but is merely carrying out the duties entrusted to him by the executive by means of certain powers conferred on him by the legislature. As a conscientious officer the Collector owes a duty to the Government to collect all the rent he can, but he is not bound by law to collect any rent at all.

This disposes of the first ground of appeal and I propose now to consider the case on the assumption that the Crown may be liable, *qua* employer, for a tort committed by a Collector of Land Revenue in the exercise of his functions as collector of rents on Crown Lands. The problem is thus brought down to this, whether the acts alleged to have been done by the Collector are such that the principle of "respondeat superior" can be applied, or, in other words, whether those acts were within the scope of the Collector's implied authority. It is not suggested here, and it is hardly conceivable, that the Collector can have had express authority from the Government to act as he is said to have acted.

In any discussion on the subject of the responsibility of employers for the tortious acts of their servants or agents reference is almost invariably made to the decisions of the Court of Exchequer in *Barwick* v. *English Joint Stock Bank*, 2 Ex. Cas. 259, and of the House of Lords in *Lloyd* v. *Grace, Smith & Co.*, (1912) A.C. 716. The rule laid down by Willes, J. in the former case, as now modified by the House of Lords, is very wide and it must be remembered that those were cases of fraud, where the person injured had dealt with the agent in matters of business as the accredited representative of the principal. A passage in the judgment of Neville, J. in *Joseph Rand* v. *Craig*, (1919) 1 Ch. at p. 6, is, I think, illuminating: "There seems to me to be a natural distinction between a case where a man directs another to do a particular act and a case where a man in business appoints an agent for the purpose of carrying on the business and holds out that person as the person to whom the public are to apply if they do business with him." Sir Frederick Pollock (Law of Torts, 11th ed. p. 76), points to the same distinction. It is therefore unsafe to rely on the general proposition that a master is answerable for every such wrong of his servant as is committed in the course of the service, and it is necessary to look to decisions which bear the closest resemblance to the circumstances of the case before us.

Sir F. Pollock classifies the cases in which the master has been held liable under four heads, according to whether the injury has been caused (a) by something done with ordinary care, (b) by want of care, (c) by excess or mistaken execution of a lawful authority, or (d) by a wilful wrong. Class (b) where the servant has been negligent in performing an authorised act, is the commonest. Class (c) includes what are known as the railway cases. Now, from one point of view, the present case seems to bear most similarity to the cases where the servant of a railway company has committed a tort when purporting to exercise the powers conferred upon him by law. The two decisions which are usually contrasted are *Poulton* v. *London & South Western Railway Co.*, 2 Q.B.C. 534 and *Bayley* v. *Manchester, Sheffield & Lincolnshire Railway Co.*, 7 C.P. 415. In *Poulton* a station master caused the arrest of a passenger under the mistaken impression that he owed money for the carriage of a horse. The Railways Clauses Consolidation Act, 1845, gave power to apprehend a person travelling on the railway without having paid his own fare, but not power to arrest for non-payment of carriage on goods. The company was held not liable for the illegal detention of the passenger, Blackburn, J. remarking: "An act was done by the station

master completely out of the scope of his authority which there can be no possible ground for supposing the railway company authorised him to do, and a thing which could never be right on the part of the company to do. Having no power themselves, they cannot give the station master any power, to do the act." In *Bayley* a porter caused injury to a passenger by violently pulling him out of a railway carriage under the erroneous impression that he was in the wrong carriage. The bye-laws of the company did not expressly authorise the removal of a person from the wrong carriage but they provided that no person should be allowed to enter a carriage without having first paid his fare. It was held that the porter had an implied authority to remove a person found in a wrong carriage and that the company was liable.

I do not think that the principle on which *Bayley* was decided can be applied here. That principle seems to be that the master will be answerable for an authorised act of the servant although it is done in an improper manner or under circumstances in which it ought to have been done. Here the sale of the land by the Collector cannot be regarded as an authorised act, because the power to sell only arises under section 6 of the Ordinance if there is no personal property available for seizure and sale under section 5. On this view of the matter I was at first disposed to think that the principle on which the decision in *Poulton* was founded should be applied and that the Crown was exempt from liability on the ground that, although the acts of the Collector were in one sense acts done in the course of his employment, the sale of the land, being in violation of the provisions of section 6, was as completely out of the scope of his authority as the act of the station master in making an illegal arrest. On reflection, however, I do not think that that is the right view to take. It may be said that the injury suffered by the petitioner was the result of the illegal sale and if we stop there *Poulton* seems to apply—but we have to look at the whole of the circumstances, and the illegal sale (on the assumption that the facts alleged in the petition are correct) can only be supposed to have been due to carelessness on the part of the Collector in failing to assure himself before he proceeded to sell the land, that no personal property was available. The proximate cause of the injury was the sale of the land, but the real cause was the absence of proper care. I think, therefore, that this case should rightly be regarded as an ordinary case of negligence, falling within class (b) of Sir F. Pollock's scheme, and, if that is so, the Crown as employer cannot avoid liability.

The true position is obscured by the interposition of an illegal act between the negligent omission and the resulting injury, also, perhaps, by the fact that the petitioner was to some extent in fault by her having failed to pay the rent when due. Suppose, however, that the landholder had in fact paid the rent and that the Collector had overlooked this and had sold the land under the erroneous impression that the rent had not been paid. It seems hardly possible that in such a case the injured party should be without redress.

The position of the Collector in relation to the Crown suggests, by analogy the relationship existing between a landlord and a bailiff who has been authorised to execute a warrant of distress, but the reported cases in which the liability of the landlord for the acts of the bailiff has been brought into question do not seem to afford much assistance. It is difficult to reconcile *Gauntlett* v. *King*, 3 C.B.N.S. 59, a decision of the Court of Common Pleas, with *Freeman* v. *Rosher*, 13. Q.B. 780, decided by the Court of Queen's Bench a few years earlier. The latter case is cited in some of the text books as an authority for the proposition that the landlord is not liable for illegal acts committed by his bailiff, not authorised by the warrant of distress or otherwise, but the judgment of Patterson, J., shows that the decision of the Court had reference to an action for trespass only and did not apply to an action on the case where the damage might have arisen from want of skill or mistake on the part of the agent.

Our attention has been called to a recent case in the Federated Malay States, where the Chief Secretary to Government was sued in respect of a tort alleged to have been committed by the Commissioner of Customs in the exercise of his functions under the Customs Enactment. The case (Selangor Suit No. 10 of 1922) is not yet reported but I have obtained copies of the record and judgments and have read them with interest. I fear, however, that they do not help us very much. The functions of a Collector of Revenue when recovering rent on Crown Land and of an officer of customs when seizing contraband liquor are not precisely analogous, and the decision of the Court of Appeal in the case in question is unsatisfactory in that the two Judges who heard the appeal, while uniting in the decision to reverse the judgment of the Court below, disagreed on the important question whether the relation between the Government, or the Chief Secretary as representing the Government, and the Commissioner of Customs could be regarded as similar to the relation of master and servant.

On this last point it is perhaps necessary to say a few words more and to refer again to *Tobin* v. *The Queen*. One of the grounds given in the elaborate judgment of Erle, C.J. in that case for the view that an action against the

Crown did not lie was that Captain Douglas, even on the assumption that he was an agent of the Queen, was not acting within the scope of his authority in seizing a ship not engaged in the slave trade, and under that head it was pointed out that the supposed analogy between the relation of the Queen to a Captain in her Majesty's Navy and the relation of a master to a servant failed for various reasons. I do not wish to go into this matter in detail and it is sufficient to say that the position of a collector of Government revenue is very different from that of an officer of the Navy or Army, that in countries where the Crown can be sued in tort it may (on the authority of the Privy Council) be liable *qua* employer for the acts of its servants and that there seems to be no reason why a collector of revenue should not be one of those servants in respect of whose acts liability may be incurred.

There remains the question whether the Crown, if not liable in tort, may not still be liable in contract. In the view that I take it is not necessary to decide this question which was very imperfectly argued and which seems to present considerable difficulty. I may note, however, that in reply to Mr. Goho's suggestion, that there might here be damages for breach of a covenant for quiet possession, the Solicitor-General did not say that there was no such covenant, but argued that there could be no breach of covenant where a tenant had been ousted by due process of law. It seems to me that one matter to be considered would be whether a covenant in law arises from the use of the word "grant" in the form of statutory land grant under Ordinance No. 34 (Crown Lands). The Real Property Act. 1845, does not extend to this Colony, but it is I believe open to question whether before that Act the word "grant" in a deed did or did not import a covenant.

To summarize my view, I think that, if the facts alleged in the petition of right are assumed to be true, there is no reason in law why the Crown should not be liable for the negligence of the Collector of Land Revenue. This appeal should therefore be dismissed with costs.

REAY, J.—The first question that arises in a case of this description is the extent to which the Crown is liable for the torts of its officers. It has not apparently hitherto been decided whether any liability at all exists. In Mr. Braddell's work on the Law of the Straits Settlements published in 1915 at pages 117 and 118, the learned author points out that a claim for damages arising out of tort will lie against the Crown in the Colony and then proceeds:

> "So it would seem that a public servant might under certain circumstances be able to plead the Government's authority for his tortious act in this Colony and plead that the action should properly lie against the Crown. The point has not been settled by the Supreme Court as yet."

In the present case the learned Solicitor-General admitted that the Crown might be liable and I am clearly of opinion that this is so. But the question has been raised in two recent cases in the Federated Malay States Courts and doubts still exist there because of some passages in the judgment of Sir Lionel Woodward, Chief Judicial Commissioner, who said *(The Chief Secretary to Government* v. *Soo Choon Wee*, Selangor Civil Appeal 10 of 1922):

> "By section 45 of the Customs Enactment officers of the Department are afforded protection from action, unless the Plaintiff expressly alleges malice or negligence and absence of reasonable and probable cause, and if at the trial he fails to prove such allegations judgment must be given for the defendant.
>
> "Cases in which the Plaintiff could prove such allegations would be rare, so that the protection given to officers is very substantial.
>
> "Mr. Hastings has ingeniously argued that this is because the policy of the legislature has been the reverse of the law as it stands in England. The Crown cannot be sued for tort, nor can it authorise a tort, but an action lies against the officer who commits the tort. The argument is that here the Government effectually protects its officers, but leaves itself open to attack. That must be so, it is argued, otherwise the injured party would have no effective remedy.
>
> "I cannot think this argument is very sound. If the Government can be sued for all torts committed by its officers, the elaborate protection afforded to its officers by sections of which section 45 of the Customs Enactment is an example, would seem to be unnecessary. What Plaintiff would choose to sue the officer against whom malice or negligence must be proved and who might be unable to pay any damages awarded, if he could sue the Government, without the necessity of alleging malice or negligence, and with the certainty that the Defendant would have the means to pay the damages? In practice, actions for tort have been brought in these States, and in the Straits Settlements, against such officers as a Police Officer and the Protector of Chinese but that perhaps is not a very strong reason for inferring that such actions, could not have

been brought against the Government. But the argument propounded to us is that the Government can be sued in an action for tort, from which the officer, the actual tort-feasor, would be protected. In other words the master can be sued for a tort committed by the servant, though no action will lie against the servant.

"That seems to me a somewhat startling extension of the doctrine of the liability of the master for the act of his servant, but I will return to that point later."

He then found there was negligence for which the Commissioner of Customs, Federated Malay States, was liable, and proceeded:

"The question is, can the Government be sued for his negligence.

"Is the principle *'respondeat superior'* to be applied in such a case?"

It has been argued that the Law of Master and Servant applies, and that the Government as master, is liable for the tort of the Commissioner, acting within the scope of his employment. That doctrine has been carried very far in England, and one very eminent Judge has expressed the opinion that it has been carried quite as far as it should be (see the judgment of Sir G. Jessell, M.R., in *Smith* v. *Keal*, 9 Q.B.D. 340).

In my opinion the relation of Government to Commissioner is not analogous to the relation of master and servant, so as to create the liability contended for.

There is good authority for holding that the head of a Government Department cannot be sued for the act of his subordinates, unless it can be shown that the act complained of was substantially the act of the head of the Department.

The subordinate is not the servant of the superior officer, both being employed by the Crown, see for instance:—

Raleigh v. *Goshen*, (1898) 1 Ch. 73, also *Bainbridge* v. *The Postmaster General*, (1906) 1 K.B. 178.

The judgment in the latter case cites the old case of *Lane* v. *Cotton*, (1 Ld. Raym. 646, 12 Mod. 472), and also the case of *Whitfield* v. *Lord L'Despencer*, (2 Cowp. 754).

These cases decided that the relation between master and servant did not subsist between a superior and a subordinate officer of Department of State and if the Chief Secretary were being sued in this case as head of the Commissioner's Department I should say that the principles on which they were decided could be properly applied to exempt from liability here.

But as I have already held, the view I take is that the Government is the real Defendant, the Chief Secretary is the nominal one.

Still, even so I think that there is no analogy between the relation of Government, and the Commissioner on the one hand and the relation of Master and Servant on the other.

I refer on the point to the case of *Tobin* v. *The Queen*, (10 L.T.Rep. 762).

That was a petition of right against the Crown for damages for the wrongful seizure and destruction of a ship by a Captain of one of H. M's. Ships, on the ground that it was engaged in the Slave Trade.

It was held that the petition could not be maintained on 3 grounds, one of which was that the Captain in seizing the vessel was not acting in obedience to the Command of Her Majesty, but in the supposed performance of a duty imposed upon him by Act of Parliament [the Acts for the Suppression of the Slave Trade (5 Geo., 4 C. 113 and 1 and 2 Vict. C. 73)].

And after quoting from the judgment of Erle, C.J., he continued:

"Now it seems to me that the reasoning in this judgment applies to this case.

"I find it a little difficult to determine what exactly is intended, in Chapter XXX of the Code, by the expression 'Government of the Federated Malay States,' but the Chapter seems to contemplate some power behind the Chief Secretary, which is a legal entity and which can be sued through the Chief Secretary as a body corporate. That entity I take to be the Rulers of the Federated Malay States, acting conjointly under the Treaty of Federation through their head executive officer, the Chief Secretary.

"In that sense I think, the Government stands in somewhat the same relation to the Commissioner as that in which the Queen was held to stand to the Captain of H. M's Ship.

"The Chief Secretary under the Customs Enactment as being the Chief Executive Officer of the Government appoints the Commissioner, not by his own mere will, as a master chooses a servant but as an officer of the Government responsible for appointing a properly qualified person.

"The will of the executive Government does not alone control the conduct of the Commissioner, but also his desire to act in accordance with the provisions of the Enactment.

"When he seized the goods and when he retained them pending the appeal he was doing what he believed he was bound by the law to do, from a sense of duty.

"If he wrongfully seized the goods or if he was negligent in the custody of them, he failed in duty imposed on him by law. In a sense of course he owes a duty to the Government to perform the functions of his office efficiently but in seizing the goods he was carrying out a duty imposed by statute."

It seems clear from this last passage that what the learned Chief Judicial Commissioner found was what the Court has been asked to find in the present case, that the Commissioner was acting in obedience to the law and was therefore *pro tanto* a statutory entity and subject to no authority except that of the law. That finding was sufficient for the decision of the case. But, after reviewing the history of the doctrine of a master's liability for the torts of his servant the learned Chief Judicial Commissioner concluded as follows:—

"The doctrine seems to have originated in the close personal relation which was supposed to exist between employer and employee, it was gradually extended to cover cases other than those of master and menial servant, and ultimately the master was held liable even for acts of his servant or agent which he had expressly forbidden. But the whole doctrine seems to me inapplicable to the relation subsisting between the executive Government, and the head of a Department such as the Commissioner of Customs.

"The latter is appointed to his office by the Chief Secretary an officer of the Government, but he is appointed to the Public Service generally by the Secretary of State. The Chief Secretary can remove him from the office of Commissioner, but not from the Public Service. So long as he continues to hold the office of Commissioner, his duties are regulated by the statute provided for his guidance by the Legislative authority, *i.e.* the Federal Council.

"The Chief Secretary, as representing the Government cannot interfere with his statutory powers.

"No authority has been cited to us for extending the doctrine to such a case as this, and I think we should be wrong in doing so.

"It has been suggested that if the respondent cannot sue the Government he will have no remedy. That may not be so, but as the statute law stands, I cannot think that the Legislature intended that the Government should be liable for such a tort as I have assumed in this case.

"If the Government was held liable under such circumstances, it is difficult to see what limit there could be to its liability for the torts of its officers.

"I think this appeal should be allowed and the judgment of the Court below reversed."

If this finding is to be taken as a denial of general liability I must disagree with it. No doubt the position of a Government officer differs in many respects from that of the servant of a subject, but there seems to be no reason why the principle of vicarious responsibility should not be applied unless special circumstances can be shown to exist which clearly make it inequitable to apply it in any particular case. In England there is no remedy against the Crown for tort. The Crown cannot be charged with negligence, fraud, or other forms of tortious wrong-doing, nor is it responsible for the acts of its agents and servants. For any violation by the Crown of the rights of a subject the remedy, if one exists, is by petition of right.

Two qualifications to these general principles have been laid down in the cases of *Feather* v. *The Queen*, (1865) 35 L.J.Q.B., where it was held that a claim might be brought where the lands or goods or money of a subject have found their way into the possession of the Crown; and *Thomas* v. *The Queen*, (1874) 44 L.J.Q.B., where it was held that damages could be obtained for breach of contract even though the breach were also a tort. But the irresponsibility of the Crown in England does not extend to its agents and servants. Every such agent or servant is personally responsible for all the torts committed by him and it is no defence that the act was done in his public capacity or in the name of or on behalf of the Crown, or even by the express command of the supreme execution. For these reasons the question cannot arise in the English Courts and the decision in *Tobin* v. *The Queen*, has remained as an unquestioned authority on the subject. If the Crown in England had been liable in tort there can be no doubt but that the reports would have been enriched by a long series of decisions dealing with the limits of the Crown's responsibility for the torts of its servants, parallel to and analogous with the very numerous cases in which the limits of the responsibility of a private master have been discussed and decided.

Nor can it be said that this exemption of the Crown is in the nature of things either necessary or in accordance with modern principles.

The fact that it does not exist in this and other Colonies is sufficient to show that there is no repugnance to natural law or equity in allowing claims in tort against the Crown and if it is true that the question of allowing such claims in England is now under consideration there, that is an indication that no difference need exist between the position of the Crown in England and the Colonies, in this respect.

It is therefore in the decisions of the Colonial Courts that authorities and analogies are to be sought for and the reports of such decisions are, unfortunately, not accessible in this country. In 1887, the Government of New South Wales was sued for damage due to trespass and negligence by its servants. The Hon'ble James Squire Farnell was then Secretary for Lands and was duly appointed to be sued as nominal defendant on behalf of the Government of the Colony. Judgment was given against the Government by the Colonial Supreme Court and an appeal was brought which is reported in 50 L.J.P.C. and elsewhere. Sir Barnes Peacock in delivering the judgment of their Lordships of the Privy Council said (page 73):

> "The declaration contained two counts. The former charged that the Government, by their servant, broke and entered the lands of the Plaintiff, situate in the Colony, and lit fires thereon, and thereby burned down and destroyed the grass, trees, and fences of the Plaintiff on the said lands.
>
> "The second alleged that the Government, by their servants, so negligently and wrongfully lighted and maintained certain fires on the Plaintiff's said lands in the first count mentioned, and upon the lands adjoining thereto, and conducted themselves so negligently and wrongfully in and about the care of the said fires, and the taking of precautions against the spreading of the same, that by reason thereof the said fires spread over the lands of the Plaintiff and burned down and destroyed large quantities of grass and fencing thereon. The count also charged special damage.
>
> "The defendant pleaded not guilty, and also demurred upon the ground that the declaration was bad in substance, and stated as grounds for demurrer, first, that the Government were not liable to be sued in an action of tort; and two other grounds which, if tenable have not been relied on in this appeal."

From this it would appear: First, that the New South Wales Government were held responsible for torts committed by its servants, and second, that either the Colonial Government did not deny responsibility, or, if it did, it declined to appeal on the question. That case is therefore, by implication if not directly an authority for the proposition now under consideration.

There remains one further point to be considered. By Ordinance No. 11 of 1912 (Public Authorities Protection), it is enacted that an action shall not lie or be prosecuted against any person for any act done in pursuance or execution or intend execution of any alleged neglect or default in the execution of any Ordinance or rules made thereunder, or of any public authority or in respect of any alleged neglect or default in the execution of any such Ordinance, rules, duty, or authority, unless, *inter alia:*

> "In every action so brought it shall be expressly alleged that the defendant acted maliciously and without reasonable or probable cause: and if at the trial the plaintiff fails to prove such allegation judgment shall be given for the defendant." (Section 2, sub-section 3).

If therefore, the Crown were not responsible for the negligent acts of its servants no remedy would be available to a subject injured by such negligence. In the Federated Malay States case already cited a similar but narrower protection clause was in question instead of the words:

> "Maliciously and without reasonable or probable cause" there being (Customs Enactment No. 31 of 1920, section 45, sub-section 2):
>
> "either maliciously or negligently and without reasonable or probable cause,"

and the effect of this exemption was argued both at the trial and in the Court of Appeal. The learned trial Judge, Mr. Justice Farrer-Manby, said in his judgment:

> "The Legal Adviser also contends that section 45 of the Customs Enactment must govern such an action as this and therefore, no malice or negligence being proved against the defendant, the action must be dismissed.
>
> "Again to hold this would render section 398, Civil Procedure Code a nullity because the ordinary torts dealt with in that section could not be made the subject of action at all,"

and the same effect would result if it is now held that Government were not responsible.

Here therefore we have another most important distinction between the position in this colony and in England. The Crown rarely, if at all, acts except through agents and servants and the right of redress for tort would be rendered

totally valueless in practice if on the one hand it could not be claimed against the Crown and on the other it could only be claimed against the officer on proof that he acted maliciously. In an Indian case *Rogers* v. *Rajendro Dutt*, (1860) 13 Moore, 236), their Lordships of the Privy Council said:

> "The civil irresponsibility of the supreme power for tortious acts could not be maintained with any show of justice, if its agents were not personally responsible for them,"

and in my opinion this consideration must prevail unless it is clear beyond all possibility of doubt that the Legislature has intended a result so opposed to the fundamental principles of English law and equity.

The second question is whether, admitting that the Crown is *prima facie* responsible for the torts of its agents and servants acting as such, the liability does not attach in their case because the officer was acting in obedience to the law and was therefore no longer subject to the direction and control of the Crown. At the hearing in the Court below the learned Solicitor-General appears to have relied entirely on this point, his argument being as stated in the notice of motion, that the Collector,

> "in selling the land in question, acted under a statutory power which conferred on him, acting as he was, in a judicial capacity, a discretion, for the wrong exercise of which the said Frederick Joseph Morten and not the Crown is liable,"

and most of his arguments before us were also directed to this point.

The general proposition here put forward is one which would apply to any servant, public or private, but from the nature of things the position is much more probable to arise in connection with a public officer. There is at first sight a considerable amount of reason in the proposition that if the law intervenes between me and my servant and compels him to do certain acts then in doing such acts he is no longer in reality my servant at all and it would be inequitable to hold me responsible for faults committed by him. But on closer examination it would appear that there is a good deal to be said on the other side. I am still responsible for having chosen my servant and put him in the position to do those acts, I am presumed to know the law, and one of the principles on which my general responsibility for his acts is based remains unaffected: that "having set the whole thing in motion" it is more reasonable, as between two innocent parties, that I, rather than a third party, should suffer. Of the statements of the reasons for the existence of a master's liability those given by Bentham and M. Sainctelette seem to be the most convincing:

> "The obligation imposed upon the master acts as a punishment, and diminishes the chances of similar misfortunes. He is interested in knowing the character and watching over the conduct of them for whom he is answerable. The law makes him an Inspector of Police, a domestic Magistrate, by rendering him answerable for their imprudence." (*Bentham*, Principles of Penal Law).
>
> "*La responsabilite du fait d'autrui n'est pas une fiction inventee par la loi positive. C'est une exigence de l'ordre social*" (*Sainctelette, De la Responsabilite et de la Garantie*).

On these Sir John Macdonell says (*The Law of Master and Servant*, 2nd Edition, page 266): "This seems the ground on which the rule of law can be justified." To these considerations must also be added the fact already noted, that in this Colony the public servant is protected unless malice can be proved, so that any exemption of the Crown would result in practice in depriving the injured party of all redress.

For the above reasons I am not prepared to say that even if it were proved in the present case that the Collector was acting in pursuance of a duty imposed upon him by law, that fact alone would relieve the Crown of responsibility for his negligence. But in the view I take of the case it is not necessary to decide this point, and I therefore pass on to the further question: was the Collector in fact acting in execution of a statutory duty and independent of control by the Crown?

The learned Solicitor-General pressed this point strongly. He said the Collector was a statutory authority, the Ordinance gave him absolute discretion, and as soon as he started proceedings he could not be interfered with any more than a Magistrate while hearing a case. The Ordinance in question (Land Revenue Collection No. 4 of 1886), provides that when a written notice of demand has been served on the person liable to pay any sum due to the Crown for rent or assessment on land and a certain period has elapsed such sum "shall be deemed to be an arrear and every person liable for it shall be deemed to be a defaulter." It then proceeds to enact that:

"With the view to the recovery of an arrear the Collector may issue an attachment, and may seize 'personal property effects and crops' and may after the prescribed notice sell the same by public auction in the prescribed manner" (section 5, sub-section 1); and

"if the arrear cannot be recovered in the manner aforesaid the Collector may proceed against the land" (section 6); and

"may by notice of sale.....declare his intention of selling.....the land and .....may sell by public auction the whole of such land or such portion thereof, or such interest therein, as he deems sufficient." (Section 7, sub-section 1).

Now these provisions would seem to be merely enabling and not mandatory. It was argued for the Crown that the word "May" should be read as "Must" or "Shall" throughout and if the argument is to succeed this appears to be necessary. But I see no reason for such a construction, and as I agree with the judgments that have already been delivered, I will merely add that the literal construction is supported by the fact that the word "Shall" appears in contradistinction to "May" in sub-section 2 of section 7 which provides that,

"the proceeds of such sale shall be applied"

in a certain manner and that,

"the Collector shall,"

dispose of any surplus in certain ways; and also in sub-section 2 of section 8, which provides that,

"the Collector shall notify by advertisement in the Gazette, the result of the sale," etc.

For these reasons I am of opinion that the decision of the Court below was correct and that the appeal should be dismissed.

Two further questions were raised in the appeal, one by the Appellant, who argued, as his second ground of appeal, that the Collector in any event acted outside the scope of his authority, and one by the Respondent, who argued that the Crown was liable in contract as well as tort. "By selling my land," said Mr. Goho, "they have ejected me and broken their covenant for quiet enjoyment." The Courts have often commented on the impropriety of raising, on appeal, questions that have not been raised at the hearing. In *Garden Gully Co.* v. *McLister*, 1 App. Cas. 39, their Lordships of the Privy Council said that though not holding parties strictly to their pleadings, they would not allow defences to be set up on appeal which had not been suggested in the pleadings or called to the attention of the Courts below, and have refused in other cases to allow such points to be raised. In *Banbury* v. *Bank of Montreal*, (1918) A.C., Lord Finlay, L.C., Lord Atkinson, Lord Shaw, Lord Parker and Lord Wrenbury, considered the rule and emphasized its importance although by a majority of three to two they decided it did not apply to the question then at issue, viz: whether the omission of the defendant to ask the trial Judge, on the ground of no evidence, to non-suit the plaintiff or direct a verdict for the defendant precluded the Court of Appeal, on a motion for a new trial, from entertaining the question of no evidence. This case well illustrates both the importance of the rule and the limits of its application. In the course of his judgment Lord Finlay, L.C., said:

"The course of practice has always been regarded as well settled that points of law alleged to entitle the party raising them to verdict or judgment must be made, at the trial, and that if they are not then made they cannot be raised afterwards." (Page 659).

"There may be cases in which by consent of counsel on both sides, express or implied, a different practice may be pursued, especially nowadays in the Commercial Court, but apart from consent the law is clear." (Page 660).

"It is, of course within the power of the presiding judge at the trial, if it occurs to him that there is a point of law which is being overlooked by the counsel in the case, to call their attention to it, and if after argument he thinks that it concludes the case, so to decide. This is a power which should be exercised sparingly, as the Judge would no doubt think it right to abstain from interfering with the conduct of the case by experienced counsel in the manner which they considered most in the interests of their clients. It would be exercised when it is apparent that, owing to inexperience or some accident, a point material to be considered has escaped the notice of counsel. When a point has been so raised on the initiation of the Judge at the trial it would of course, be open on appeal. At the trial further evidence may be called to remedy the supposed defect. It is a novel proposition that when the trial is over a Court of Appeal may be invited by the counsel on one side or the other to enter judgment on a point which they deliberately did not put forward at the trial. It was suggested by the respondents that in such a case it would be the duty of the Court of Appeal to ascertain whether the defect might have been cured by further evidence, and only in this case

to refuse to entertain the objection. This would be most inconvenient, and indeed impracticable. The introduction of such a practice might encourage unscrupulous litigants to abstain from raising a point at the trial because they thought this would improve their chances with the jury and then to bring it forward in the Court of Appeal in the hope that the other side might fail in satisfying the Court of Appeal that evidence might have been available to meet the point if it had been taken at the trial. It is at the trial, that such points of evidence should be dealt with. It is then that further evidence to remedy the suggested flaw may be tendered if it exists, and an adjournment may be obtained for the purpose. That is the time to test the existence of further evidence. For this reason the law of practice has provided that such a point cannot be raised on a motion for a new trial if it had not been taken, and this applies *a fortiori* to an attempt to get judgment entered. The rule is intended to secure the fair conduct of jury trials. Any relaxation, such as the respondents contended for, would throw upon the Court of Appeal the duty of entering upon a very difficult, and in many cases impossible, inquiry as to what evidence there might have been." (Pages 661-2).

Lord Shaw of Dunfermline stated that in his opinion the judgment of the Lord Chancellor was correct and that he agreed with it and with every part of it and reviewed a number of authorities including *Macdougall* v. *Knight*, 14 App. Cas., where Lord Halsbury said:

> "The parties took their chance of what the jury would do, and I think nothing could be more mischievous than to allow litigants to raise new questions when, under such circumstances the jury have decided against them. If such a course were permitted no end could possibly be found for litigation."

But Lord Atkinson pointed out that although it was no doubt true that in practice a Judge does not generally withdraw a question from the jury unless asked to do so, there was no obvious reason for this, viz:—

> "If it should turn out that he was wrong in so withdrawing it he might inflict great cost upon the litigant in whose favour he withdraws it, though the latter might possibly have got from the jury a finding in his favour," (pages 637-4)

and after reviewing the authorities cited Lord Herschell's judgment in the *Tasmania*, (1890) 15 App. Cas., where the Court below held that the *City of Corinth*, with which the *Tasmania* collided, was alone to blame, and in the Court of Appeal, the point was raised for the first time that the evidence showed that the *Tasmania* was also to blame. Lord Herschell said:

> "My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested.... It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case, if the controversy had arisen at the trial: and next that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness-box." (Page 679).

Lord Parker of Waddington agreed, saying:

> "There are no doubt cases in which the Court of Appeal have refused to allow points of law not taken in the Court of first instance to be raised on appeal. But these cases do not go to jurisdiction, but to discretion. It may be that if a point of law had been taken below further evidence would have been adduced, or a further or different question left to the jury. In such cases it would be manifestly unfair and unjust to allow the point to be raised for the first time in the Court of Appeal. In the present case there is no such element of unfairness or injustice. It is not suggested that had the point been taken below any further evidence could have been adduced, or any further or different question left to the jury. Why then, should not the Court of Appeal have felt itself at liberty to do complete justice between the parties on the evidence before them? I can see no reason at all," (Page 705)

and Lord Wrenbury was of the same opinion. He said:

> "The appellant has argued that, inasmuch as the point of law that there was no evidence of authority was not taken at the

trial, the respondents could not raise in a Court of Appeal a question of law not raised in the Court of first instance. It would require a great deal to persuade me that a Court of Appeal is bound to adjudicate wrongly because it had not occurred to either judge or counsel to raise a point of law in the Court below. The way the appellant seeks to put it is that the Court of Appeal is not in such case asked to decide wrongly, but only to say that the point is one which it is not competent to them to decide at all because it was not argued below. The result, however, is the same. The result of the contention, if it be correct, is that the Court of Appeal is bound to make an erroneous order because a point of law has been overlooked below. It may well be that under the circumstances the Court of Appeal could not justly allow the point of law to be raised. For instance, it may be that if the point had been raised in the Court of the first instance the party whose interest it was to dispute it would or could have called evidence which would affect the result. If so, the Court of Appeal would no doubt say that it would not be fair to allow it to be raised. But this is a totally different thing from saying that it *cannot* be raised." (Page 714).

The same question was again considered in *North Staffordshire Railway Co.* v. *Edge*, (1920) A.C. 254, where the appellants had contended for the first time in the Court of Appeal that section 90 of the Railways Clauses Consolidation Act, 1845, did not apply to through rates. The head note of the case refers to this as a point of law, and such indeed, it seems to have been. The Lord Chancellor (Lord Birkenhead) refused to deal with the point on the grounds, that it had not been put forward in the original pleadings nor argued before the trial Judge. He then said (page 263):

"An attempt indeed was made to present the argument to the Court of Appeal, but that tribunal refused, and in my opinion rightly refused, to be influenced by an attempt so belated. I share their view for many reasons, to some of which I attempted to give expression in *Wilson* v. *United Counties Bank*. An attempt was made in the argument to distinguish the doctrines there laid down from those which it was said ought to govern the present case, on the ground that the issue here was a simple point of law of such a kind that the Respondent could sustain no possible prejudice by the postponement of its discussion to the appellate stage. It is sufficient to say, in reply to this contention, that there are very few cases of which it can be confidently stated that a failure to raise a relevant contention at the appropriate stage will not prejudice the other litigant,"

and after referring to the impossibility of adequately compensating a respondent through the medium of costs, he proceeded (pages 263-4):

"But I desire to draw attention to a consideration which in my view is both more general and more important. The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods. The issues of the fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of appellate tribunals to require that the judgments of the Judges in the Courts below shall be read. The efficiency and the authority of a Court of Appeal, and especially of a final Court of Appeal, are increased and strengthened by the opinions of the learned Judges, who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the Judges in the Courts below. Decisions of this House have laid it down that in very exceptional cases, and in spito of the considerations above referred to, new matters may be considered by your Lordships: see the judgment of Lord Halsbury in *Sutherland* v. *Thompson*, and the judgment of Lord Watson in *Connecticut Fire Insurance Co.* v. *Kavanagh*. I have carefully examined the cases upon the subject which have been decided in this House and my examination of them has led me more and more to the conclusion that such attempts must be vigilantly examined and seldom indulged.

"For these reasons I move your Lordships that the appeal be dismissed with costs."

Lord Dunedin agreed "that the point ought not to be allowed to be raised here," reserving his opinion on its merits if it should ever be necessary to decide it. His statement of the law was as follows (pages 265-6):

"If the omission be a mere omission to state and argue a legal proposition which requires for its discussion no underlying

hypothesis of facts other than those which have been admitted or proved in the Courts below, I should hold that your Lordships should not turn a deaf ear to such argument even at the eleventh hour. But if the proposition is such that a variation in the admitted or proved facts, or any addition to them, would affect the argument, then I think it is too late, and that your Lordships should not allow the argument to be put forward."

Lord Atkinson said the rule was well established and that Lord Herschell had, in the *Tasmania*, enunciated it in clear words, and held that (page 267):

"In the present case it seems to me impossible to say either that the House has before it all the facts bearing on the new contention as completely as would have been the case had it been raised at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct was impeached if an opportunity had been offered to them for explanation."

He concluded his judgment with the following words (page 269):

"It is, no doubt, desirable that in every case coming on appeal before your Lordships, you should enjoy the great advantage of having before you the decision of the Court of Appeal upon all the points raised upon the appeal to this House. But it by no means follows that parties should never be permitted, in any case, to raise, and have decided here, questions which were not raised in the Court of Appeal, nor even in the Court of first instance, though this House should thereby lose the advantage of having before it the decisions of both these tribunals on the new point. This House cannot on this ground escape, in my view, from the duty (to use Lord Halsbury's words) 'of making such an order as ought to have been made originally.' In the present case the new point raised by the appellants is that section 90 does not apply to through rates, and that the increased rate charged in the present case was in fact charged in respect of the haulage of the respondent's goods over lines other than, and in addition to, the lines of the appellant company. Otherwise it would not be a through rate at all. Mr. Talbot, however, alleges that, if he had had notice of this point he could have shown, on grounds which he indicates, that the increased charge is made in respect of the transit over the Staffordshire line, and that line alone. If that be so, the point is a bad point. Its goodness or badness depends accordingly on a controverted issue of fact which the Railway Company have failed to raise at the trial or to have determined upon evidence.

"I think the case is completely covered by the authorities I have cited, and that the appellants ought not to be permitted to raise this new point now.

"I think the appeal should be dismissed."

Lord Buckmaster said that he found himself most closely in accord with the views of Lord Atkinson, and proceeded (page 270):

"Such a matter is not to be determined by mere consideration of the convenience of this House, but by considering whether it is possible to be assured that full justice can be done between the parties by permitting new points of controversy to be discussed. If there be further matters of fact that could possibly and properly influence the judgment to be formed, and one party has omitted to take steps to place such matters before the Court because the defined issues did not render it material there, leave to raise a new issue dependent on such facts at a late stage ought to be refused, and this is settled practice. Subject to this it would not be wise in my opinion to fetter or restrain by fixed rule the discretion which this House enjoys, a discretion which it would always be anxious to exercise so as to avoid injustice being done."

In the light of these and other authorities I think it is, to say the least, doubtful if it was open to either Appellant or Respondent to raise the fresh points of law that they did raise in the present Appeal. But neither of them objected and in view of the judgments already given and of my finding on the first ground of appeal it is not necessary to say more than this. The gist of the matter is the negligence of the Collector. It is possible that had it been necessary, Respondent might have established a claim in contract and might have derived some assistance from the rule already cited, that redress may be had on petition of right where the lands or goods or money of a subject have found their way into the possession of the Crown *(Feather* v. *The Queen)*. On the second ground of appeal I agree with the judgments already given and would only add that the obvious differences between the position, duties, and terms of service, of most

public officers, and those of ordinary servants or agents, make it difficult to transfer rules and definitions from one class to the other. Had the Crown in England been liable in tort there would no doubt have been a series of decisions applicable to servants of the Crown. It is quite certain that what Mr. Morten did was in his official capacity, as Collector, and this fundamental distinction might be held to be sufficient in most cases for the determination of the question whether the Crown is liable.

Appeal dismissed.

Solicitor for the Appellant—*Solicitor General, S.S.*

Solicitor for the Respondent—*S. C. Goho.*

From this decision of the Court of Appeal the Crown preferred an appeal to the Privy Council, which was dismissed. The Privy Council decision is reported in L.R. (1925) A.C. 555. The judgment of the Board is reproduced in the Appendix to *Braddell's* Law of the Straits Settlements, Vol. II. at pp. 441-447.

[ORIGINAL CIVIL JURISDICTION]

TERRELL, J.

August 4, 1932.

RE CHOP CHEONG JOO
EX PARTE HEAP THAI CHENG

[SINGAPORE BANKRUPTCY No. 361 of 1929]

Dividend in bankruptcy—method of attachment — garnishment — equitable execution—substituted proof.

A dividend in bankruptcy cannot be garnished but a party holding an unsatisfied judgment against a creditor in a bankruptcy may obtain an order in the suit appointing a receiver of the dividend by way of equitable execution and may thereafter apply by motion in the bankruptcy for an order authorising the Official Assignee to accept a proof by such applicant, in place of the original proof, and to pay all moneys payable in respect of such proof to the applicant until the amount specified in the Order is satisfied.

A Receiving Order in bankruptcy was made against Chop Cheong Joo and certain partners in the chop were adjudged bankrupt. One Lee Kee (m.w.) filed a proof for $80,000/- and the Official Assignee admitted the proof for part thereof. A dividend was declared but payment to Lee Quee Kee and certain other creditors was delayed.

In Suit No. 1083 of 1931, Stanton Nelson & Co., Ltd., recovered judgment against Lee Quee Kee for $30,000/- and costs.

They then applied to the Court by motion for an Order that they might be substituted for Lee Quee Kee as a creditor proving in the bankruptcy.

Walters for the applicants.

E. N. Taylor, Assistant Official Assignee.

Cur. Ad. Vult.

TERRELL, J.—This is a motion on behalf of Messrs. Stanton Nelson & Company, Limited, creditors, for an order that they may be substituted for the creditor Lee Quee Kee who has proved in this bankruptcy and that all benefit arising to Lee Quee Kee by reason of such proof should be given up to an amount of $30,000/- to the applicants in addition to their own proof already filed.

It appears from the affidavit of Eric Gregory Jones filed in support of the application that the applicants had obtained judgment in Suit No. 1083 of 1931, against Lee Quee Kee for the sum of $55,036/- and costs to be taxed. Lee Quee Kee had lodged proof in the bankruptcy for $80,000/-.

It is clear on the authorities that the Official Assignee can only pay creditors who prove (see Section 60 of the Bankruptcy Ordinance), and it follows from this that no form of execution or garnishment can issue against the Official Assignee in respect of a judgment obtained against a creditor even where the proof has been admitted, see *Prout* v. *Gregory*, 24 Q.B.D. page 281, and *In re Frost*, 1899, 2 Q.B. page 50. These decisions were followed by Deane, J., in Singapore Bankruptcy No. 565 of 1922 where he held that a dividend could not be garnished (see *Van Someren*, (Third Edition) Notes to Section 621 (2) of the Civil Procedure Code). On the other hand it has been decided that the assignee of a creditor's proof can apply to have his own proof substituted to that of the creditor, *In re Iliff*, 5 W. R. page 80, and the same rule has been applied in the case of an equitable assignment, *Re Hills, Ex parte Lang*, 107 L.T. page 95.

In the above two cases, however, the party who sought to prove had established some right to the creditor's dividend either by an actual legal assignment or through equitable assignment. It appears to me that the proper course is that indicated by Barrett-Lennard, J., in the Singapore Suit No. 312 of 1918, also referred to in Van Someren's Notes, and the applicants, Messrs. Stanton Nelson & Co., should apply for the Sheriff to be appointed receiver by way of equitable execution on their behalf of any dividend payable to Lee Quee Kee in the Bankruptcy. It is true that on the authorities cited this would not be an order binding the Official Assignee or upon which he would be required to act but the effect of the appointment of a receiver would be to give the applicants an interest in Lee Quee Kee's dividend which would be the equivalent of an equitable assignment. The production of the order, however, would satisfy the Official Assignee of the interest of the applicants in Lee Quee Kee's proof and he would then no doubt consent to a substitution of the applicant's proof.